UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

DATE PREPARED: August 25, 1983

RE: JAMES ASHWORTH
83-TLC-8

STATEMENT OF THE CASE

PURSUANT TO 20 C.F.R. §655.212 (1983), ON AUGUST 17, 1983, THE ABOVE-CAPTIONED EMPLOYER SOUGHT ADMINISTRATIVE-JUDICAL REVIEW OF THE REGIONAL ADMINISTRATOR'S (RA) DENIAL OF AN APPLICATION FOR TEMPORARY LABOR CERTIFICATION. THE CASE RECORD WAS FILED FOR CONSIDERATION BY THE UNDERSIGNED ON AUGUST 22, 1983. THE FINAL DECISION OF THE U.S. DEPARTMENT OF LABOR FOLLOWS.

ISSUES

THE RA DENIED CERTIFICATION ON THE GROUND THAT EMPLOYER (I) FILED AN UNTIMELY APPLICATION, (II) FAILED TO SPECIFY ACCURATE DATES OF EMPLOYMENT, (III) DID NOT PROVIDE AN ITINERARY EVIDENCING CONTRACTS WITH FARMS TO HARVEST GRAIN ALONG WITH DATES WORK WOULD BEGIN AND END, (IV) IMPROPERLY SUBMITTED AN APPLICATION FOR HIMSELF AS AN EMPLOYEE, (V) LISTED JOB DUTIES IN THE APPLICATION THAT DO NOT CORRELATE WITH THOSE SET FORTH IN THE CLEARANCE ORDER, (VI) DID NOT ACCURATELY CODE AND TITLE THE POSITIONS FOR WHICH , CERTIFICATIONS WERE SOUGHT.

DISCUSSION

ON AUGUST 8, 1983, EMPLOYER FILED TWO APPLICATIONS WITH THE LOCAL OFFICE. IN RESPONSE TO THE FORM'S REQUEST FOR "EXACT DATES YOU EXPECT TO EMPLOY ALIEN," EMPLOYER STATED: "PRESENT" TO "END HARVEST." IN HIS APPEAL OF THE RA'S DENIAL, EMPLOYER STATED THAT HIS RESPONSE WAS "A COMMONLY UNDERSTOOD TERM IN THE PROFESSION," AND HE THEN MORE PRECISELY FIXED THE PERIOD OF INTENDED EMPLOYMENT AS, DEPENDENT ON WEATHER, SEPTEMBER 15 TO DECEMBER 15. §655.201(b)(3) MANDATES THAT AN EMPLOYER PROVIDE "THE SPECIFIC ESTIMATED DATE OF

NEED OF WORKERS." AND §655.206 (b)(l) ALLOWS CERTIFICATIONS TO ISSUE, BY WAY OF EXAMPLE, FOR "THE 1978 APPLE HARVEST SEASON." APPLICANTS IN THIS CASE WOULD APPARENTLY HARVEST WHEAT, MILO AND CORN. THE END Of HARVEST, AS CUSTOMARILY UNDERSTOOD, WOULD SEEM TO BE SUFFICIENTLY SPECIFIC UNDER THE REGULATIONS AS THE DATE WORKERS WOULD NO LONGER BE NEEDED. BUT A DISCREPANCY EXISTS CONCERNING THE DATE WORKERS ARE FIRST NEEDED. EMPLOYER INITIALLY REPORTED "PRESENT," THE AUGUST 4, 1983, APPLICATION DATE. IN HIS APPEAL REQUEST, HE POSTULATES SEPTEMBER 15 AS THE CUSTOMARY STARTING TIME. THE ANTICIPATED STARTING TIME, AS STATED IN THE APPLICATION, APPEAR TO BE PREMATURE BY OVER ONE MONTH; AND IT IS, THEREFORE, MISLEADING. EMPLOYER UTILIZED AN ATTORNEY AS AGENT IN PROCESSING THESE APPLICATIONS. MISLEADING INFORMATION ON THE APPLICATION DOES NOT SEEM JUSTIFIED BY EXTENUATING CIRCUMSTANCES. THUS, ISSUE 2 WAS CORRECTLY RESOLVED BY THE RA.

§§655.200 and 655.201(c) CALL ON EMPLOYER TO APPLY FOR CERTIFICATION AT LEAST 80 DAYS BEFORE THE ESTIMATED DATE OF NEED. EMPLOYER'S APPLICATION WAS FILED (AUGUST 8) SLIGHTLY MORE THAN ONE MONTH BEFORE HARVESTING WAS TO BEGIN (SEPTEMBER 15). THE RA PROMPTLY AND APPROPRIATELY ADVISED EMPLOYER THAT CERTIFICATION MUST BE DENIED DUE TO LACK OF TIME TO TEST THE AVAILABILITY OF U.S. WORKERS. UNDER §655.202(e), THE RA HAS THE DISCRETION TO WAIVE UNTIMELY FILINGS "IN EMERGENCY SITUATIONS. . .[FOR] EMPLOYERS WHO HAVE NOT MADE USE OF TEMPORARY ALIEN WORKERS FOR THE PRIOR YEAR'S HARVEST OR FOR OTHER GOOD AND SUBSTANTIAL CAUSE, PROVIDED THE RA HAS SUFFICIENT LABOR MARKET INFORMATION TO MAKE THE LABOR CERTIFICATION DETERMINATIONS REQUIRED BY 8 CFR 214.2(h)(3)(i)." EMPLOYER ALLEGES THAT THE LOCAL OFFICE REFUSED TO ACCEPT THE APPLICATION IN MAY 1983. BUT, ON THE RECORD BEFORE THE RA, TO WHICH THIS REVIEW IS LIMITED (§655.212), THE APPLICATION IS UNTIMELY, AND REQUIREMENTS FOR A WAIVER HAVE BEEN NEITHER ALLEGED NOR DEMONSTRATED. ISSUE 1 WAS, THEREFORE, PROPERLY RESOLVED BY THE RA.

JAMES ASHWORTH, THE NAMED EMPLOYER, SEEKS TO HIRE HIMSELF. AS EMPLOYER AND PROSPECTIVE ALIEN EMPLOYEE, HIS ADDRESS IS LOCATED IN CANADA. FOR PURPOSES OF PROCESSING THE APPLICATION, HIS ATTORNEY-AGENT RESIDES IN SOUTH DAKOTA. NOTHING IN THE RECORD FAIRLY SUGGESTS THAT EMPLOYER ACTUALLY HAS A CURRENT LOCATION WITHIN THE U.S. TO WHICH U.S. WORKERS MAY BE REFERRED (DEFINITION OF "EMPLOYER" AT §655.200(b)). EVEN IN VIEW OF THE ITINERANT NATURE OF GRAIN HARVESTING, EMPLOYER'S CURRENT OR FUTURE U.S. SITUS-- SOUTH DAKOTA FOR MR. ASHWORTH, NOT DISCLOSED FOR HIS ASSISTANT-- IS TOO

VAGUE (SEE ISSUE III). MOREOVER, THE REGULATIONS DO NOT APPEAR TO ALLOW AN EMPLOYER TO HIRE HIMSELF THROUGH A TEMPORARY LABOR CERTIFICATION FILING. EMPLOYER WOULD SURELY BE PRECLUDED FROM DOING SO UNDER PERMANENT LABOR CERTIFICATION RESTRICTIONS (§656.50 DEFINITION OF "EMPLOYMENT"). GIVEN THE SIMILARITY BETWEEN TEMPORARY AND PERMANENT LABOR CERTIFICATION REGULATIONS (§655.0(c) AND DEFINITIONS OR "EMPLOYER") AND THE PURPOSE OF INSURING THAT U.S. WORKERS ARE NOT ADVERSELY AFFECTED, A LIKE RESULT SHOULD OBTAIN IN TEMPORARY LABOR CERTIFICATION CASES. THE EMPLOYER-PROSPECTIVE EMPLOYEE CANNOT REASONABLY EXPECT TO HIRE A U.S. WORKER INSTEAD OF HIMSELF. REGARDING ISSUES III AND IV, THE RA PROPERLY DETERMINED THAT MR. ASHWORTH WAS NOT AN "EMPLOYER."

ISSUE VI IS WITHOUT MERIT, AS THE GOVERNMENT, NOT THE APPLICANT, ASSIGNS JOB TITLES AND CODES RECOGNIZED BY THE DICTIONARY OF OCCUPATIONAL TITLES. ISSUE V NEED NOT BE ADDRESSED IN VIEW OF PROCEDURAL DEFECTS ALREADY DISCUSSED THESE DEFECTS PRECLUDE CERTIFICATION. ACCORDINGLY, THE DETERMINATION OF THE RA IS HEREBY AFFIRMED. FURTHER REVIEW MAY BE OBTAINED BY FILING A PETITION WITH THE DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IN YOUR GEOGRAPHICAL AREA PURSUANT TO 8 C.F.R. §214.2(h)(3).

ARTHUR C. WHITE
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